United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2316

To be argued by
ARTHUR B. KRAMER

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

ALAN C. SOLOMON,

Defendant-Appellant.

B
P/S

REPLY BRIEF OF DEFENDANT-APPELLANT
ALAN C. SOLOMON

NICKERSON, KRAMER, LOWENSTEIN,
NESSEN, KAMIN & SOLL
Attorneys for Defendant-Appellant
919 Third Avenue
New York, New York 10022
(212) 688-1100

ARTHUR B. KRAMER
HAROLD P. WEINBERGER
Of Counsel

3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Index No. 74-2316

ALAN C. SOLOMON, :

Defendant-Appellant. :

----------x

REPLY BRIEF OF DEFENDANT-APPELLANT ALAN C. SOLOMON

INTRODUCTION

In this reply brief we respond to the arguments set forth in the government's brief. For the most part the government has focused on trying to rebut the showing made in Point II of our main brief that the New York Stock Exchange interrogation of Mr. Solomon was governmental in character and that therefore the Garrity rule bars use by the prosecution of the Solomon Exchange testimony and its fruits. The government in its brief makes a red-herring policy argument against granting use immunity to coerced admissions obtained by what it chooses to label as "private" investigative bodies; it seeks unsuccessfully to distinguish the facts in Sanney; and it makes an ingenuous attempt to show that the Solomon Exchange testimony was given voluntarily.

We respond to these arguments seriatim. We then demonstrate that, should this Court rule with us that the Solomon Exchange testimony was indeed impermissibly coerced, the proper course under Kastigar would be a final dismissal of the case and not a remand for a new trial.

I

THE GOVERNMENT HAS NOT RESPONDED -- EXCEPT WITH UNSUPPORTED CONCLUSORY ASSERTIONS -- TO THE ARGUMENTS IN POINTS I AND II OF OUR MAIN BRIEF UNDER WHICH MR. SOLOMON'S EXCHANGE TESTIMONY OUGHT CLEARLY TO BE ACCORDED USE IMMUNITY

A.

One key issue divides the parties on this appeal. The government and we are agreed that if the Exchange was engaged in the performance of a state or governmental function in its interrogation of Mr. Solomon, the Garrity rule of necessity applies and the Solomon Exchange testimony must be accorded use immunity.

We have demonstrated in our main brief that the Exchange inquiry into the Weis net capital and misreporting violations was specifically mandated under the Securities Exchange Act of 1934 and the Commission rules (App. Br. at pp. 23-28). The governmental nature of this inquiry is manifest by all of the case-law bench marks. Evans v. Newton 382 U.S. 296 (1966).

The government claims that the Exchange inquiry did not involve state or governmental action. For reasons which remain obscure under a jumble of abstract and conclusory propositions gleaned from the literature of an earlier, pre-Exchange Act era, the government seeks to place a "private association" label on the Exchange; "like any other private organization," it "has always had the power to establish rules and regulations for self-disciplinary purposes"; what the Exchange was about in the Weis investigation, the government goes on to imply, was the enforcement of the internal administrative rules of a private gentlemen's club having no public impact, in which the federal government was in no way involved and to which, therefore, the strictures of Garrity ought not be applied (Gov. Br. at pp. 6-10).

The government in its brief, as did the District Court in its two opinions below, has resolutely refused to address itself to the facts at hand and to the specific statutory framework under which the Exchange was required to, and did in fact, conduct its inquiry into the Weis affair.

The minimum net capital and bookkeeping obligations of New York Stock Exchange member firms are fixed by the Exchange Act of 1934 as supplemented by the SEC Rules. Within these federally defined norms, the Exchange

has set its own more stringent requirements; and it is required, again by the federal regulatory scheme, to police them. It is as clear as can be that that is precisely what the Exchange was about when it examined Mr. Solomon in the course of the Weis investigation. This was confirmed by the uncontroverted testimony of four Exchange staff members who participated in the Weis investigation and testified at the suppression hearing. That federal law requires the Exchange to perform these policing activities -- as the SEC's designated agent -- was driven home by the testimony of SEC Regional Administrator Moran set out in our main brief at pp. 28-29.

In short, it is federal law which fixes the net capital and reporting norms for member firms and federal law which has delegated to the Exchange, the duty in the first instance, of enforcing these norms. It is the federal mandate -- completely glossed over in the government's brief -- which is critical and which indubitably marks the Exchange inquiry as governmental in character.*

* As the District Court so aptly puts it in Crimmins v. American Stock Exchange, Inc. at 346 F.Supp. 1256, 1259:

> "We think that the day is long gone when a national stock exchange can be considered a private club when it conducts disciplinary proceedings against its members or their employees. When an exchange conducts such proceedings under the self-regulatory power conferred upon it by the 1934 Act, it is engaged in governmental action, federal in character, and the Act imposed upon it the requirement that it comply with fundamental standards of fair play."

In labelling the Exchange as a self-regulating private association the government would hide behind a semantic screen divorced from the realities of the Exchange Act regulatory framework which imposed specific enforcement responsibilities upon the Exchange, responsibilities the Exchange was, in fact, fulfilling in the Weis investigation.

B.

In an attempt to shore up its untenable private club argument, the government's brief goes on at great length about the supposedly adverse practical consequences of adoption of a rule conferring use immunity upon Exchange testimony obtained under the circumstances here involved. The government says that to adapt such a rule would immunize from later criminal prosecution all who testify before "private" investigative bodies; that there would be a great rush by miscreants into this newly available "immunity bath"; and that this Court would in effect be repealing, by judicial fiat, the general immunity statute, thus frustrating "the intent of Congress * * * as recently articulated in passage of *** Title II of the Organized Crime Control Act of 1968, 18 U.S.C. § 6001-6005" (Gov. Br., p. 11).

This parade of horribles is build upon an egregious non sequitur and a complete misstatement of our position. We

argue, with Garrity, that the government may not use for prosecutorial purposes testimony elicited from a witness, compelled to testify under a job forfeiture threat, in a state sanctioned inquiry. This does not mean, nor have we ever suggested, that a witness whose testimony has been so compelled should be immunized from prosecution. The restrictions upon the prosecutor are limited ones: he is free to build whatever case he can from independent sources; what is beyond the pale is use of the coerced testimony and its fruits. This seems a reasonable enough restraint in light of the Fifth Amendment's explicit command that "no person shall be compelled in any criminal case to be a witness against himself". The government ought not seek to convict a suspect by using his own statements against him when these have been obtained in the coercive setting of a threatened loss of employment.

The argument in the government's brief that immunity from prosecution is the unavoidable consequence of use immunity is completely fallacious. No more than does the prohibition against the use of a coerced confession protect the confessor from indictment and conviction; provided only that the case is built upon untainted evidence, the prosecution may go forward untrammeled.

C.

The government concedes that this Court's decision in the Sanney case resolves against it any possible argument that the threatened loss of private, as opposed to public, employment distinguishes this case from Garrity. The government would distinguish the Sanney case, however, as one in which "state involvement was overwhelming" and "not comparable to this case" (Gov. Br. p. 10).

Aside from the fact that in our case the Exchange inquiry must be regarded as state action in view of the federal statutory mandate, the government's involvement in the actual process of obtaining Mr. Solomon's testimony was no less "overwhelming" than in Sanney. There the police asked a private investigator conducting a new job interview to question a criminal suspect, knowing that the suspect would be motivated, in his job quest, to answer. In our case the SEC investigators delivered the same sort of message by way of a subpoena to the Exchange calling for the production of the Solomon testimony at a time when (i) Solomon had not yet testified; (ii) the SEC suspected Solomon of criminal involvement, as its own antecedent memoranda make clear; (iii) the SEC knew that Solomon would be testifying within a day or two in the Exchange inquiry; and (iv) the SEC knew that Solomon could not

refuse to answer at the Exchange inquest without risking expulsion from the securities business. It is indeed difficult to perceive how the SEC involvement in obtaining access to the Solomon testimony -- against this background of undisputed facts -- can be differentiated functionally from the police involvement in Sanney. If in the one case the involvement was, in the words of the government's brief "overwhelming", so was it here.

D.

Elsewhere in its welter of footnotes the government argues that Mr. Solomon's testimony before the Exchange cannot be deemed involuntary, within the ambit of Garrity, because it was not reasonable for Mr. Solomon to take seriously the threat of possible expulsion for failure to testify before the Exchange; he should have known that he was going to be suspended in any event because the Exchange had independent evidence of wrongdoing (Gov. Br. p. 17).

The short answer to this tortuous argument is that the case law makes it crystal clear that what goes on in a witness' mind -- what he knew or should have known concerning the probabilities of losing his job for failure to testify -- is of no legal significance. The threat of suspension as embodied in the Constitution of the Exchange is what renders

testimony obtained from someone subject to its strictures involuntary under the Garrity rationale. (See discussion at p. 15 of our main brief)

The government's presentation of the facts upon which it bases its voluntariness argument, is, moreover, skewed. As testified to by the responsible Exchange official, Mr. Solomon would have been summarily suspended from the securities business had he invoked his Fifth Amendment privilege and failed to testify at the Exchange inquiry (67a).

II

NOTWITHSTANDING THE GOVERNMENT'S BELATED CLAIM OF SOME GRAND JURY TESTIMONY -- OTHER THAN MR. SOLOMON'S -- ON THE COUNT 7 CHARGE, THE CASE AGAINST MR. SOLOMON SHOULD BE DISMISSED

The government has asserted that the grand jury minutes disclose testimony by Messrs. Kubie and Lynn sufficient by itself, without reliance upon the Solomon Exchange testimony, to support Count 7 of the indictment. Thus, the government claims, the premise upon which Point III of our main brief rests -- that there was no evidence other than Mr. Solomon's grand jury testimony to support Count 7 -- has no basis in fact.

We have no way of testing the government's assertion. When we called upon the government to produce for our inspection the grand jury minutes which show what evidence was before the grand jury on Count 7, the government produced only the Solomon Exchange testimony. Now, for the first time, we are told that there was Kubie and Lynn testimony relating to this count.

Whatever the grand jury minutes disclose, we would doubt that the Kubie and Lynn grand jury testimony on the Pan Am bond transaction could be of any significant probative value, for the testimony they gave the Exchange on this subject consisted of vague hearsay speculations. At a minimum there must be a serious question as to whether the grand jury would have returned an indictment on Count 7 absent Mr. Solomon's testimony. Thus, for the reasons suggested by Chief Judge Friendly in Goldberg v. United States, cited and discussed at pages 41-42 of our main brief, there has to be "serious doubt about the validity of such an indictment." The grand jurors could not well have put out of mind the incriminating admissions contained in the Solomon Exchange testimony.

In United States v. Laughlin, 223 F.Supp. 623 (D.D.C. 1963), adhered to on reconsideration, 226 F.Supp. 112 (D.D.C. 1964), the Court dismissed an indictment based in some indeterminate part upon illegally seized tapes. The Court stated the basis for its holding at 226 F.Supp. 112, 114 as follows:

> "It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However, there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here." (Emphasis added).

Here, where we believe that the Kubie and Lynn testimony on Count 7, if any there be, must have been secondary and speculative in character, the grand jury must have been primarily influenced by the illicit evidence which was improperly submitted to it by the prosecutor. Under the rationale of Goldberg and Laughlin, the appropriate remedy is dismissal of the indictment.

Finally, the government has not deigned to respond at all to the arguments set forth in Point IV of our main brief that it would have to demonstrate at a hearing on remaind prior to any retrial of the case that it had a source independent of the Solomon Exchange testimony for any evidence it might present at a new trial. The mere assertion, in another of the government's copious footnotes, that Mr. Kubie's Exchange testimony of May 10, 1973 was an available independent source hardly meets the test enunciated in Kastigar.

The record before this Court leaves no room for doubt that the prosecutor was led to all of the significant evidence set forth in the stipulation of facts through use of the Solomon testimony. Kubie's Exchange testimony, to which the government points on the Count 7 charge, has little or no probative value.* The fact is that the government must

---

* The only testimony Kubie gave in his Exchange testimony about the Pan Am bond transaction appears at pp. 41-42 of the May 10th transcript (Gov. Exhibit 3) as follows:

"Q. Do you know which categories the erroneous figures would be in?

A. Well, specifically, I -- offhand, I don't have -- I don't remember. But generally speaking, it was unrecorded liabilities, which would probably be -- accounted for a portion of it; bad accruals, assets that were not good under Rule 325, which was used as good capital.

Oh, yes, there was one other situation that comes to mind; and that's something about a Pan American bond, which I subsequently found out about. I think a bond was purchased and priced at -- priced at -- and the pricing that was used for the bond was a different issue.

Q. Do you know if this was done intentionally?

A. I can only assume it was done intentionally. It was done through Alan Solomon's account, if I remember correctly.

Q. And do you remember the name of that bond?

A. I think it was a Pan Am bond.

Q. When you say, "Pan Am," --

A. Pan American.

Q. -- do you mean Pan American Airlines?

A. Yes." (Emphasis added).

have relied almost totally on the Solomon Exchange testimony both in its presentation to the grand jury and in developing leads to evidence offered at trial. Compare United States v. McDaniel 482 F.2d 305 (8th Cir. 1973) discussed at pp. 46-47 of our main brief.

Thus, the government could not hope at a hearing on remand to show that it could have proved a case against Mr. Solomon without the aid of his own improperly gotten admissions. For the reasons discussed at length at Point IV of our main brief, the government could not hope for a conviction on a retrial. The sensible way to shortcut what is bound to be an impossible task for the government would be to dismiss the indictment now -- whatever the previously undisclosed grand jury testimony of Kubie and Lynn may reveal.

CONCLUSION

For the reasons set forth in our main brief, none of which has been sensibly rebutted by the government, the judgment of conviction against Mr. Solomon should be reversed and the case dismissed.

Respectfully submitted,

Nickerson, Kramer, Lowenstein,
Nessen, Kamin & Soll
Attorneys for Appellant
919 Third Avenue
New York, New York 10022
(212) 688-1100

Arthur B. Kramer
Harold P. Weinberger

Of counsel